IN THE

SUPREME COURT OF THE UNITED STATES.

No. [redacted] 11

OCTOBER TERM,

WILLIAM H. NICHOLS,
Petitioner,
vs.
UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Your Petitioner, William H. Nichols, respectfully shows unto Your Honors that he is aggrieved by the opinions of the United States Court of Appeals of the Sixth Circuit, rendered on April 4, 1960, and the Decrees entered pursuant thereto affirming the judgment of the United States District Court for the Middle District of Tennessee, Nashville Division.

OPINION BELOW.

The opinion of the Court of Appeals has not yet been reported and is printed in the Appendix, infra, page 7.

JURISDICTION.

The judgment of the Court of Appeals was entered on April 4, 1960 (Appendix, infra, page 9). The jurisdiction of this Court is invoked under 28 U. S. C., Sec. 1254, Subsection (1).

QUESTIONS PRESENTED.

1. Whether the testimony of a police officer identifying a defendant seen in the night time as his automobile passed that of the officer, corroborated by the testimony of a passenger in the automobile after whipping by the officer, substantial evidence whereby a conviction for the possession of untax paid liquor may be sustained.

2. Whether the public policy of the United States as expressed in the Fourth Amendment to the United States Constitution permits the use in evidence of testimony of a witness whipped by city police officers in the prosecution of a case "adopted" by the Alcohol and Tobacco Tax Division of the Internal Revenue Service.

STATEMENT.

On or about March 20, 1957, Nashville City Police officer, Robert E. Coggins, at approximately 8:00 P. M., in a traffic investigation car, was watching a four-way stop sign in East Nashville; as he was traveling south on Meridian Street, he observed a car coming toward him on that same street. He saw the car run the stop sign, make a right turn into Cleveland Street and sought to overtake the car. After a chase of many blocks, the driver of the car abandoned the same and escaped. The officer found a

negro, Haynie, in the car and a quantity of "untaxed whiskey" in the rear of the car. The defendant, Nichols, gave himself up two nights later. The officer identified the defendant, Nichols, as the man who had been driving the automobile. The officer was not acquainted with the defendant, Nichols, prior to the time and had never seen him before in his life. Officer J. W. Irwin came to the scene of the arrest of the witness Haynie, and told by officer Coggins that Haynie had told him that the driver of the car was the defendant, William H. Nichols. The United States called next, the witness Arthur Haynie, who testified that the driver of the automobile was William H. Nichols, the defendant. Haynie testified that he was whipped at the scene of his arrest and later at the police station with a leather strap, "about ten or fifteen minutes". The witnesses, Edith Lewis and Georgie Ruth Branch, occupants of the houses in the yard of which the automobile had been abandoned and Haynie arrested, testified as to the whipping given Haynie by the police officer after his apprehension. Josh Nichols, father of the defendant, testified that he had been paying Officer Coggins Ten ($10.00) Dollars per month on behalf of the defendant William Nichols for about nine (9) months prior to the officer's accusation of the defendant and that he was behind one monthly payment at the time, that Officer Coggins was not "too pleased" about the lateness of the payment. The witness, Josh Nichols, was corroborated in part by the witness, James Thomas and substantially by the wife of the defendant, Emogene Nichols.

REASONS FOR GRANTING THE WRIT.

The testimony against the defendant was so insubstantial as to require the setting aside of the conviction. The Government's principal witness, Coggins, testified that he recognized the defendant as their automobiles passed in the night time, but the Government did not stop at that point in the presentation of its case. They called Officer J. W.

Irwin and, vouching for his credibility, showed, that Officer Coggins had been told by the witness Haynie that it was the defendant Nichols who had been driving the automobile in which the whiskey was found. The testimony of Haynie was at most that of an accomplice. Such testimony is insufficient for the sustaining of a conviction where it has been obtained unlawfully. See **Sykes v. U. S.**, 204 Fed. 909, 123 C. C. A. 205, where a conviction was set aside when it appeared that the accomplice's testimony had been obtained by the promise of immunity.

In the Federal Court, the uncorroborated testimony of an accomplice will sustain a conviction, but even here the rule is limited by the fact that the testimony of the accomplice must not be otherwise incredible or unsubstantial on its face.

Esters v. U. S., 260 Fed. (2d) 393;
Haakinson v. U. S., 238 Fed. (2d) 775.

The Fourth Amendment to the United States Constitution reads as follows:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The Constitutional Amendment above quoted is an affirmative statement of the public policy of the United States extending not alone to the person from whom evidence is unlawfully obtained, but also to a co-defendant, where evidence obtained illegally is introduced against both.

United States v. Thomson, 113 Fed. (2) 643, 129 A. L. R. 1291.

Counsel is aware of the many cases indicating a contrary ruling, but upon examination, these will be found to be cases in which the evidence obtained was had by unlawful search of the premises belonging solely to one of several co-defendants; the principle sought here to be submitted is that if the people of the United States are to be secure against unreasonable searches and seizures, the United States should not permit a prosecution to be based upon testimony had from an admittedly whipped or beaten witness. As to the fact of the beating given the witness Haynie, in calling him as a witness, the Government vouched for his credibility; in addition, the fact of the beating was independently established by eye witnesses.

The conviction is not based upon substantial evidence and the evidence obtained and presented against the defendant was had as the result of police brutality.

Premises Considered, Petitioner Prays:

1. That he be permitted to file this Petition and the Writ of Certiorari issue from this Court to the United States Circuit Court of Appeals for the Sixth District, directing the latter Court to cause the record in this cause to be certified and removed to this Court, here to be tried and reviewed with respect to the errors hereinafter assigned.

2. Petitioner also prays for general relief.

This Is the First Application for the Writ of Certiorari in This Cause.

LILLARD & BIRCH,
By ROBT. E. LILLARD,
Solicitors for Defendant.

State of Tennessee
County of Davidson

Robert E. Lillard makes oath that he is one of the attorneys for the Petitioner in the foregoing Petition and that the allegations therein made and in the accompanying Brief and Argument are true to the best of his knowledge, information and belief; and that he is more familiar with the facts therein stated than is the Petitioner; and that in his opinion, the Petitioner is entitled to the relief sought.

Robt. E. Lillard.

Sworn to and subscribed before me, this 20th day of May, 1960.

Louise Dozier,
(Seal) Notary Public.

My Commission expires April 28, 1963.

I hereby certify that I forwarded three (3) copies of the foregoing Petition for Writ of Certiorari to the Honorable J. Lee Rankin, Solicitor General for the United States of America, Department of Justice, Washington 25, D. C.

Robert E. Lillard.

Sworn to and subscribed before me, this 28 day of May, 1960.

Louise Dozier,
(Seal) Notary Public.

My Commission expires April 28, 1963.

APPENDIX.

Opinion.

(Filed April 4, 1960.)

No. 13,990.

UNITED STATES COURT OF APPEALS,
For the Sixth Circuit.

William H. Nichols, Appellant, vs. United States of America, Appellee.	}	Appeal from the United States District Court for the Middle District of Tennessee, Nashville Division.

Decided April 4, 1960.

Before: Simons, Senior Judge, Pope, Circuit Judge, and O'Sullivan, District Judge.

Simons, Senior Judge. The appellant was tried and convicted for unlawful possession of untaxed whiskey in violation of Tit. 26 U. S. C. A. Sec. 5008 (b). His complaint is that there was no substantial evidence to support the conviction and that public policy, as declared by the Fourth Amendment, was offended by use of testimony from a witness who had been beaten up by the police. The pertinent facts follow.

On March 20, 1957, at approximately 8 P. M., a Nashville City Police Officer named Coggins saw a car run a stop sign and make a right turn at about 35 feet from Coggins' police car. Coggins pursued but after a chase the driver stopped, abandoned the car and escaped. Arthur Haynie was found in the abandoned car and either Cog-

gins or a fellow officer beat him up there and again at the police station. Haynie told Coggins that appellant was the driver of the car which was found to contain a quantity of "untaxed whiskey". Haynie so testified at the trial and he was corroborated by Coggins who identified the appellant as the driver of the car which passed him at the stop street. He said he got a fleeting glimpse of the driver when the car crossed the headlights of the police car while making the right turn.

The evidence presented by Haynie and Coggins constituted substantial evidence on which a conviction could be based. Even if Haynie was an accomplice and not a mere passenger, it is the rule that a conviction can be supported by an accomplice's uncorroborated testimony. **Caminetti v. United States**, 242 U. S. 470, 495; **Robertson v. United States**, 111 F. 2d 1018 (6 Cir.); **United States v. Moran**, 151 F. 2d 661 (2 Cir.); **Todorow v. United States**, 173 F. 2d 439 (9 Cir.), certiorari denied 337 U. S. 925. This is the rule even if it be shown that the accomplice believed he would personally benefit from testifying against the defendant. **United States v. Rainone**, 192 F. 2d 860 (2 Cir.). The fact that a witness may have been threatened, or beaten, goes to the weight of the evidence and not its admissibility and is within the province of the jury. The Appellate Court cannot weigh evidence or determine the credibility of witnesses, **Battjes v. United States**, 172 F. 2d 1, 5 (6 Cir.). In any event, the beating of a witness was a contention personal to such witness and not available to the appellant as a matter of law.

Though the record fails to show any motion at or before trial to suppress evidence of law violation found in the abandoned car, the appellant presents a question of unreasonable search and seizure. While it is settled that evidence obtained in violation of the prohibition of the Fourth Amendment cannot be used in a prosecution

against the victim of unlawful search, this applies only if the defendant makes timely objection. **Weeks v. United States**, 232 U. S. 383, approved in **Goldstein v. United States**, 316 U. S. 114 at 120. Moreover, for illegally obtained evidence to be excluded in a federal court, it must appear that federal officers participated in the illegality or that the unlawful acts were done on their behalf. There was no such situation here, the search, if any, having been made by a City police officer without participation or even knowledge of federal officers. **Irvine v. People of State of California**, 347 U. S. 128, 136.

We find no prejudicial error in the cause and the judgment therein is,

Affirmed.

Judgment.

(Filed April 4, 1960.)

Appeal from the United States District Court for the Middle District of Tennessee.

This cause came on to be heard on the transcript of the record from the United States District Court for the Middle District of Tennessee, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed.

Approved for entry:

/s/ Charles C. Simons,
Senior Circuit Judge.

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Office Supreme Court, U.S.
FILED
JUL 1 1960
JAMES R. BROWNING, Clerk

No. 113

In the Supreme Court of the United States

OCTOBER TERM, 1960

WILLIAM H. NICHOLS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

J. LEE RANKIN,
Solicitor General,
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In the Supreme Court of the United States

OCTOBER TERM, 1960

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 7–9) is reported at 276 F.2d 147.

JURISDICTION

The judgment of the court of appeals was entered on April 4, 1960 (Pet. App. 9). On May 2, 1960, Mr. Justice Stewart extended the time for filing a petition for a writ of certiorari to and including June 3, 1960. The petition was filed on May 31, 1960. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether there was sufficient evidence identifying petitioner as the driver of an automobile containing untaxed liquor so as to sustain his conviction for unlawful possession of such liquor.

STATEMENT

Petitioner was charged in a one-count indictment in the United States District Court for the Middle District of Tennessee with the unlawful possession of 15 gallons of untaxed whiskey, in violation of 26 U.S.C. 5008(b) (R. 1). The jury found him guilty and the court sentenced him to imprisonment for one year and one day and a $250 fine, the period of imprisonment later being reduced to eight months (R. 3–6). On appeal (R. 8–9), the conviction was affirmed (Pet. App. 7–9).

Pertinent evidence adduced at the trial may be summarized as follows:

On March 20, 1957 at about 8:00 p.m., Nashville police officer Coggins, proceeding south on Meridian Street, saw a Buick car going north run through a stop light and make a right turn (R. 11–12). When the police car, which had its headlights on, was about 35 feet from the Buick, Coggins saw the driver as he made the turn. At the trial Coggins identified petitioner as the driver (R. 16–18, 12–13). Coggins pursued the Buick, but the driver abandoned it and some shooting occurred. Coggins arrested one Haynie near the car (R. 13, 20). Coggins told another police officer who arrived at the scene that Haynie had told him that petitioner was the driver of the car (R. 21). Five one-gallon jugs and ten broken jugs containing untaxed whiskey were found in the trunk of the Buick. Petitioner gave himself up at police headquarters two nights later (R. 14). No federal officers participated in the investigation (Pet. 9).

Haynie testified on direct examination that petitioner was the driver of the Buick (Tr. 54–60).[1] On cross-examination, Haynie stated that although he had been whipped by other police officers (not identified in this record) who arrived at the car after Coggins had stopped it,[2] he had told Coggins before the whipping that petitioner was the driver of the car; and that Coggins had not whipped him (R. 23–24). Haynie further testified that he was again whipped at the police station, where the officers were trying to get him to tell where petitioner kept his whiskey. Haynie replied that he did not know, since he did not work for the petitioner and had just been riding home with him (R. 24, 25).

ARGUMENT

There is no merit to petitioner's basic contention that there was not sufficient evidence that he was the driver of the car containing the untaxed liquor to sustain his conviction (Pet. 3–5).[3] Both officer Coggins and Haynie, who had been in the car with petitioner prior to his arrest, testified that petitioner was the driver. Coggins testified that, when only the short distance of 35 feet away and with his headlights on, he saw petitioner make the right turn. This testimony was based upon the witness' actual observation,

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[1] "Tr." refers to the trial transcript, which is not included in the certified record filed with this Court. We have lodged a copy of the transcript with the Clerk.

[2] Two witnesses corroborated the testimony of the whipping at the car (R. 36, 37).

[3] Petitioner does not renew his argument, rejected by the court below, that there was an unreasonable search and seizure of the liquor (see Pet. App. 8–9).

not upon the fact that Haynie later told him that petitioner was the driver. Its credibility was for the jury.

Haynie's trial testimony was that petitioner was the driver of the car. The fact that Haynie allegedly was beaten by the police after the car had been stopped did not taint that testimony, or render it inadmissible.* No federal officer participated in the beating. The beating was not administered to compel Haynie to identify the driver of the car—he had voluntarily done so to Coggins before the beating occurred—but in an attempt to ascertain where petitioner kept his whiskey. Thus, neither Haynie's designation of petitioner to Coggins as the driver, nor his trial testimony to that effect, was the product of the beating. Whether Haynie was an innocent passenger in the car or petitioner's accomplice,[5] his testimony that petitioner was the driver of the car, even if it had not been corroborated by Coggins, was sufficient to support the conviction. See *Caminetti* v. *United States*, 242 U.S. 470, 495; *Todorow* v. *United States*, 173 F. 2d 439, 444 (C.A. 9), certiorari denied, 337 U.S. 925.

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* The Department of Justice is investigating the alleged beating of Haynie by local police, to determine whether there has been any violation of 18 U.S.C. 242.

[5] The record does not establish that Haynie was an accomplice. There was no evidence that he knew the contraband liquor was in the trunk of petitioner's car, and he did not flee as the petitioner did. He testified that he did not work for the petitioner, but was just riding home with him at the time (R. 25).

CONCLUSION

For the reasons stated it is respectfully submitted that the petition for a writ of certiorari should be denied.

J. LEE RANKIN,
Solicitor General.
MALCOLM RICHARD WILKEY,
Assistant Attorney General.
BEATRICE ROSENBERG,
ROBERT G. MAYSACK,
Attorneys.

JULY 1960.